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OFFICE OF THE CLERK

No. 93-833

In The

Supreme Court of the United States

October Term, 1993

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Petitioners,

vs.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There are several statements in the Petitioners' Statement of the Case which are incorrect but only one of these is of significance for the jurisdictional issue. The Petitioners are in error when they proclaim that, "The state supreme court . . . treated the separate appeals as consolidated." (Petitioners' brief, page 6.) This error is critical to the question of whether the Petitioners may now seek review from the decision of the Florida Supreme Court. The history of this case demonstrates that the Petitioners' state court appeal has not yet been resolved and therefore they may not seek review.

As the Petitioners acknowledge, there were two groups of appellants who sought review of the Florida Circuit Court injunctive order of April 8, 1993. The first appeal was filed on April 19, 1993 by the defendants Judy Madsen, Ed Martin and Shirley Hobbs who actually cast their papers as an appeal on behalf of all the trial court defendants. The present Petitioners filed a separate notice of appeal on May 7, 1993 and objected to being included in the first filed appeal.

Under Florida law, the separate appeals of these two groups were directed to the Florida District Court of Appeal, Fifth District and were given separate case numbers. The appellants in the first filed case then joined with the state court Appellees (the present Respondents) and filed a joint motion for certification of the first case to the Supreme Court of Florida. The present Petitioners, Operation Rescue, Patrick Mahoney, Randall Terry and Bruce Cadle, were not part of that case and did not join that motion nor was the separately filed second case in

any way referenced by the District Court of Appeal in granting the motion. (Respondents' Appendix 1.)

The Fifth District Court of Appeal did take action in the case filed by the present Petitioners and that was to stay the proceedings in their case. (Respondents' Appendix 2.) Thus, the Petitioners, who elected not to join in the first appeal of the state trial court injunction and not join with the Appellees' (now Respondents) motion to consolidate the two appeals, now find that their separate appeal is still before the Fifth District Court of Appeal.

This conclusion is underscored by the most recent court order from the Florida intermediate appellate court. After the Petition for Writ of Certiorari was filed in this Court on November 24, 1993, the Fifth District Court of Appeal entered an order in the second appeal filed by these Petitioners. The order, dated November 30, 1993, dissolved the August 13, 1993 order staying further proceedings in the Petitioners' appeal and directed the Appellees (the Respondents here) to file an answer brief in the second case. (Respondents' Appendix 3.) The brief filed in response to that order is attached. (Respondents' Appendix 4.)

CONCLUSION

Since no decision has been announced in the Petitioners' state court appeal, the Petition is premature and should be denied.

Respectfully submitted,

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APPENDIX 1.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, JUDY MADSEN, et al.,

Appellant,

v. Case No. 93-969

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., et al.,

Appellee.

_____/

DATE: June 3, 1993

BY ORDER OF THE COURT:

The Appellants seek review of an order of the Circuit Court for Seminole County, Florida, granting a permanent injunction sharply restricting demonstrations outside an abortion clinic. The Appellants allege that the injunction infringes upon the exercise of the First Amendment rights to peacefully demonstrate, picket, distribute literature and express one's self on public property, sidewalks, roadways, and rights of way. The Appellees argue that the injunction protects their First Amendment rights, their rights to privacy, their rights to engage in business activity, and their clients' rights to obtain medical treatment. Appellants have and are engaging in such activities on a statewide basis that similar injunctions have been

issued throughout the state. The constitutionality of the injunction(s), require immediate resolution by the Florida Supreme Court. Accordingly, it is

ORDERED that the JOINT MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed April 27, 1993, is granted. Moreover, it is

ORDERED that this Court hereby certifies that the constitutionality of the injunction issued below is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the State. This Court therefore requests the Supreme Court of Florida to accept jurisdiction of this case pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Talbot D'Alemberte, Esq.
Bruce Cadle, Esq.
Patrick Mahoney, Esq.
Randall Terry, Esq.
Mathew D. Staver, Esq., and
Jeffrey T. Kipi, Esq.
Hon. Sid J. White, Clerk,
Florida Supreme Court
(with case (file)
Kathy Patrick, Esq.
Jerri Blair, Esq.
Christopher Weiss, Esq.
Sheila R. Eschenberg, Esq.

APPENDIX 2.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Appellant,

v. Case No. 93-1149

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Appellee.

_____/

DATE: August 13, 1993

BY ORDER OF THE COURT:

ORDERED that Appellants' untimely MOTION FOR CERTIFICATION OF CASE TO THE FLORIDA SUPREME COURT, filed June 18, 1993, is denied. It is further

ORDERED that Appellees' MOTION TO STAY FURTHER PROCEEDINGS PENDING DETERMINATION OF COMPANION CASE BY FLORIDA SUPREME COURT, filed June 14, 1993, is granted. Accordingly, the appellate proceedings in this cause are stayed pending resolution by the Florida Supreme Court of *Operation Rescue v. Woman's Health Center, Inc.*, Appeal No. 93-969, Supreme

Court Case No. 81,905, certified by this Court pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: John Tanner, Esq., and Jay Sekulow, Esq.
John G. Stepanovich, Esq.
Mathew D. Staver, Esq., and Jeffery T. Kipi, Esq.
Talbot D'Alemberte, Esq.
Kathy Patrick, Esq.

APPENDIX 3.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY AND BRUCE CADLE,

Appellant,

v. Case No. 93-1149

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Appellee.

_____/

DATE: November 30, 1993

BY ORDER OF THE COURT:

Upon consideration of the ruling by the Florida Supreme Court in *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. October 28, 1993), it is

ORDERED that the August 13, 1993, Stay Order of this Court is dissolved. Appellees shall file their answer brief in this cause, within fifteen days from the date hereof.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Christopher J. Weiss, Esq.
Jerri Blair, Esq.
Talbot D'Alemberte, Esq.
John Tanner, Esq., and Jay Sekulow, Esq.
John G. Staver, Esq., and Jeffrey T. Kipi, Esq.
Kathy Patrick, Esq.

APPENDIX 4.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

OPERATION RESCUE, PATRICK MAHONEY ET AL.,

Appellants,

v.

WOMEN'S HEALTH CENTER, INC., ET AL.,

Appellees.

_____/

CASE NO. 93-01149

Appeal from Eighteenth Judicial Circuit Case No. 91-2811-CA-16-K

BRIEF OF APPELLEES

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COUNSEL FOR PLAINTIFFS

STATEMENT OF THE CASE

The events which have transpired since the Appellants filed their brief require a new statement of the case. Because the issues raised in this case have now been resolved, the statement of the case will be the predicate for the argument.

This case was the second appeal filed from an injunctive order entered on April 8, 1993 by the Hon. Robert B. McGregor of the Eighteenth Judicial Circuit. The first case, numbered 93-969 by this Court, was certified to the Supreme Court of Florida on the joint motion of the appellants in that case and the appellees. The appellants in this case were not parties to the stipulation and this case was not certified to the Supreme Court of Florida. Instead, this case was stayed by the August 13, 1993 order of this court and that order was not dissolved until November 30, 1993, when this Court also directed that this brief be filed.

During the period of this stay, the Supreme Court of Florida received briefs (including amici briefs), heard oral argument and issued its opinion affirming the April 8, 1993 injunctive order. A copy of that opinion has been filed with this Court, *Operation Rescue, et al. v. Women's Health Center, Inc., et al., No. 81,905, October 28, 1993.*

ARGUMENT

The appellants in this case elected to maintain a separate appeal and declined to join the first appeal taken by their co-defendants from the April 8, 1993 injunctive order. The first appeal (case number 93-969 before this court) was certified to the Supreme Court of Florida. That case has now been resolved and the injunctive order has been upheld.

The appellants, though not parties to the case before the Florida Supreme Court, were allowed to file a brief in that proceeding. That brief raised the same arguments advanced in the brief the appellants have filed in this

court. In the Supreme Court of Florida, the appellees were permitted to file a responsive brief but elected not to do so since the brief raised no new argument not already advanced by the original appellants.

The opinion of the Florida Supreme Court disposed of all the issues raised by the appellants in this case and they concede as much by their premature effort to seek review in the Supreme Court of the United States even before disposition of this case. On November 24, 1993, the appellants in this case filed a "Petition for Writ of Certiorari to the Supreme Court of Florida" seeking review of the decision by the Florida court.

CONCLUSION

Therefore, since there are no further issues to be addressed by this Court, the appellees respectfully request the Court to enter an opinion adopting the opinion of the Supreme Court of Florida in its case Number 81,905.

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